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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1986

COUNTY OF MONROE and ANDREW P. MELONI, MONROE COUNTY SHERIFF,

Petitioners,

vs.

ANN WEBER and GARY J. WEBER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a visual body cavity search of arrestees carried under a mandated State policy, made upon reasonable suspicion of the class of arrestees (when the uncontroverted testimony is that 70% of arrestees brought to the Jail are found to carry contraband on or in their bodies), is constitutional in particular where a plaintiff is charged with the crime of resisting arrest.

2. Whether a sheriff is entitled to a good faith immunity when there is no clear established case law as to the unconstitutionality of visual body cavity searches.

3. Whether a county can be made responsible for the acts of a sheriff when a state constitution (adopted prior to the legislation of 42 USC §1983) prohibits same.

TABLE OF CONTENTS

	Page
Questions Presented	*i*
Table of Citations	*ii*
Opinions Below	1
Jurisdiction	2
Grounds for Review	2
Statement of the Case	3
Summary of Argument	4
ARGUMENTS FOR ALLOWANCE OF THE WRIT OF CERTIORARI	
The State Policy of Strip Searching Arrestees Regardless of the Offense is not in Violation of the Fourth and Fourteenth Amendments of the United States Constitution	6
Neither the County of Monroe nor the Sheriff ever Promulgated the Strip Search Policy at the City Lockup	18
The Sheriff is Entitled to Good Faith Defense and Qualified Immunity	20
The County may not be Made Responsible for the Acts of the Sheriff	23
Conclusion	26

APPENDIX

Page

A — Decision and Order of the U.S. District Court entered March 11, 1986 ..... A-1

B — Decision of U.S. Court of Appeals for the Second Circuit dated November 6, 1986..... B-1

C — Prisoner Data Report of Ann Weber..... C-1

D — 9 N.Y.C.R.R. §7502 ..... D-1

TABLE OF CITATIONS

Page

Bell v. Wolfish, 441 US 520 ..... 2, 8, 9, 10, 12, 16, 17, 22

Blackburn v. Snow, 771 F.2d 556 25

Block v. Rutherford, 104 S.Ct. 3227 ..... 2, 7, 8, 9, 10, 12, 16, 17, 22

Daughtry v. Harris, 476 F.2d 292; *cert. denied* 414 US 872 17

Harlow v. Fitzgerald, 457 U.S. 800..... 21

Hodges v. Klein, 411 F. Supp. 896 17

Jones v. Edwards, 770 F.2d 738..... 17

Matter of County of Cayuga v. McHugh, 4 N.Y.2d 609 . 19

McCann v Coughlin, 698 F.2d 112 22

McNulty v. Chinlund, 62 A.D.2d 682 19

Sala v. County of Suffolk, 604 F.2d 207..... 21

Security and Law Enforcement Employees et al v. Cary et al, 737 F.2d 187 .....2, 13, 14, 22

U.S. v. Chadwick, 4343 U.S. at 7 14

Wallace v. King, 626 F.2d 1157 23

New York State Constitution:

Article XVII Section 5 18

Statutes:

28 U.S.C. §1254(1) 2

N.Y.C.R.R. Title 9, ¶7502.1 18

N.Y. Administrative Code Title IX §7502.1(a) 20

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT

The Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 6, 1986.

OPINIONS BELOW

The following opinions and orders of the lower courts are included in the Appendix to the Petition: 1. Opinion of the United States District Court, Western District of New York rendered March 11, 1986. 2. Opinion of the United States Court of Appeals for the Second Circuit, rendered on November 6, 1986 in this action.

JURISDICTION

The opinion of the Court of Appeals was entered on November 6, 1986. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C.§1254(1).

GROUNDS FOR REVIEW

The significance of this petition for writ of certiorari to the Court of Appeals for the Second Circuit is substantial. The question to be decided is whether Federal Appeals Courts should impose their opinions on matters of security in a jail over the experience, knowledge and expertise of jail administrators. In particular, in view of uncontroverted proof that 70% of the people who are arrested are found to carry contraband on and in their bodies regardless of the offense for which they were arrested. The further significance of this petition is the question whether our jails should be permitted to become as unsafe for inmates and guards, as the streets of our cities are today for our citizens.

In addition, the decision of the Second Circuit is contrary to this Court's holdings in *Bell v. Wolfish,* 441 US 520 and *Block v. Rutherford,* 104 S.Ct.3227. This decision also conflicts with the Second Circuit's own decision in *Security and Law Enforcement Employees, et al v. Cary et al,* 737 F.2d, 187. Additionally, there is a conflict amongst the circuits themselves as to whether or not such searches are constitutional and permissible, with the 8th Circuit upholding the permissibility of visual body cavity searches for those arrested for resisting arrest. The conflict among the circuits is not only as to the permissibility of the searches, but also as the criteria under which they may be permissible.

It is therefore of the utmost importance for this court to decide this issue which affects the safety of jails all over the country.

STATEMENT OF THE CASE

In the early morning of June 19, 1983, plaintiff, Ann Weber, telephoned Rochester Police Dispatch and requested that a car be sent to her home in order to file a criminal mischief report about an incident which occurred some time before. A short time later when a police car still had not been dispatched for the complaint, plaintiff, Ann Weber, called Police Dispatch once again and reported that shots had been fired at 20 Penhurst Street (her address) and that a man was shot.[1] Police vehicles responded at that time and Officer Jenson Rembert of the Rochester Police Department confronted Mrs. Weber who admitted to him that she made the phone call. The officer then advised her that she was under arrest for falsely reporting the incident. While attempting to place plaintiff Weber in a Rochester Police vehicle to affect the arrest, a number of people interfered and Mrs. Weber fled into her house. A fight then erupted involving Rochester Police officers and several people, including plaintiff, Gary Weber, were arrested. Several Rochester Police officers entered Mrs. Weber's home and searched for her and finally located her in the house. Mrs. Weber then grabbed hold of Officer Sue Shannon, spun the officer around and thereafter started hitting and kicking police officers with her arms and legs as they attempted to subdue her. Eventually, she was subdued, handcuffed, and carried down to the police car. Throughout that time, Mrs. Weber was screaming obscenities at the police officers.

When Mrs. Weber was arrested and brought to the City lockup around 3:15 a.m., the arresting officer explained the charges to the Deputy Sheriffs on duty at the booking office of the female part of the City lockup. In addition, the Prisoner Data Report which was turned over to the deputy contained the entry that "Upon arrest defendant fought with police". She was then pat

[1] The Second Circuit adopted the facts alleged by plaintiffs, not only on the motion for summary judgment by defendants, but also on the motion for partial summary judgment by plaintiff, Ann Weber.

searched, as is the procedure, before being placed in a holding cell. She was processed, and bail was set for her by a City police officer, but she was unable to post the bail and, therefore, had to be placed in a cell in the jail while waiting to be bailed out. She was finally bailed out at 6:00 a.m. (See Appendix - C entry 63 & 64)[2]

Before being placed in the cell in the jail, she was asked to remove her clothes and was subjected to a visual inspection of her body. This inspection was conducted by a female jail guard and took place in a room at the end of the corridor and out of the way. The room had solid walls and a solid door and the person inside was not visible to any other person who may walk down the hallway.

The strip search policy was conducted according to a *state* mandated policy.

Mrs. Weber eventually was bailed out and left the City lockup at 6:00 a.m. She then commenced an action against the City police, a different, unrelated entity to the County of Monroe and the Sheriff, and later commenced an action against the County and the Sheriff.

The County and the Sheriff moved for summary judgment and the District Court granted the motion. The Second Circuit reversed.

SUMMARY OF ARGUMENTS

1. THE STATE POLICY OF STRIP SEARCHING ARRESTEES REGARDLESS OF THE OFFENSE IS NOT IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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[2] The Second Circuit in citing the background of this case adopted plaintiff's version over this official document which was before it, and determined that Mrs. Weber was detained only for one-half hour rather than the actual three hours.

Visual body cavity searches are necessary for the security of the jails, the lives of the guards and inmates.

When the uncontroverted testimony is that 70% of all arrestees, regardless of the offense with which they are charged, are found, during a visual body cavity search, to carry contraband, such as guns, knives, illegal drugs, etc. on and in their bodies, the policy of searching arrestees should be held constitutional. To do otherwise will make the jails unsafe and endanger lives.

2. NEITHER THE COUNTY NOR THE SHERIFF EVER PROMULGATED THE STRIP SEARCH POLICY AT THE CITY LOCKUP.

Only the state has the right to promulgate rules for admission of persons into the jail. The Sheriff is mandated to implement such policy and has no discretion. The County has no authority to promulgate rules.

3. THE SHERIFF IS ENTITLED TO GOOD FAITH DEFENSE AND QUALIFIED IMMUNITY.

At the time of the search there was no established law prohibiting visual body cavity searches, and therefore the sheriff is entitled to good faith immunity.

4. THE COUNTY MAY NOT BE MADE RESPONSIBLE FOR THE ACTS OF THE SHERIFF.

The State Constitution prohibits making the County responsible for the acts of the Sheriff.

ARGUMENTS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

THE STATE POLICY OF STRIP SEARCHING ARRESTEES REGARDLESS OF THE OFFENSE IS NOT IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

The Second Circuit held that the State policy of strip searching arrestees violates their Fourth Amendment rights. The Court held that the Fourth Amendment precludes prison officials from performing body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee and/or the circumstances of the arrest.

The criteria imposed by the Second Circuit is one of the most unreasonable yet. Assuming, as in this case, that a prisoner is brought into a jail by law enforcement officers from another jurisdiction at 3:00 o'clock in the morning and cannot come up with bail within a reasonable amount of time and therefore must be put in a corridor cell where contact may be made between the person and other inmates, the Second Circuit requires that the jail guard who is present at 3:00 o'clock in the morning in the jail should determine, based on the crime charged, the particular characteristics of the arrestee and the circumstances of the arrest, whether there is reason to believe that the particular person is concealing weapons or other contraband on and in his/her body. How can a jail guard who may see the individual for a short time determine the characteristics of the arrestee. The guard will not have any data available from any jurisdiction as to whether or not the person is a dangerous individual or has a criminal record. Can a guard be expected just by looking at a person, to make a determination, whether the person carries contraband. Obvi-

ously not. This court stated in *Block v. Rutherford,* 104 S.Ct 3227 that this requirement is difficult if not impossible. Yet, the Second Circuit made this a necessary requirement for permitting visual body cavity searches. As to the requirement that a search may depend on the the crime charged, many murderers and other violent offenders have been arrested on minor charges such as traffic violation or on income tax evasion. What will happen when a person is stopped for a traffic violation or other misdemeanor after committing a vicious crime? Under the decision of the Second Circuit, such person cannot be searched, even if in reality he carries a weapon on his body. That weapon may be used against guards or other prisoners. Thus, there is no reasonable relation at all between the crime charged and whether or not a person carries contraband on or in their body. In particular today, when so many people, even professionals, use drugs, the chance of finding contraband on a person, regardless of who that person is, is quite high and is not related to the crime charged. Many drivers carry illegal drugs on their bodies. As to the circumstances of the arrest, such of course are unknown to the jail guards as the police officers who deliver the prisoners are not necessarily those who participate in the actual arrest or may not have the time to acquaint the jail guards regarding the circumstances of each arrest.

In our case, the evidence by Sheriff Meloni, and by Edna Craven, a jail guard who conducts searches and is present in the jail on a daily basis, that prisoners come in with weapons such as knives and other dangerous instruments and drugs hidden upon their bodies is uncontradicted. Ms. Craven further stated that "it had been our experience that weapons and drugs are found very often also on people charged only with traffic violations"[3] Obviously, such testimony clearly contradicts the Second Circuit's position that there was lack of reasonable suspicion of arrestees which would permit visual body cavity searches. The evidence in

[3] Interestingly enough, the Second Circuit did not even refer to Sgt. Craven's testimony.

this case by way of Ms. Craven's and Mr. Meloni's affidavits and testimony and the photographs of the contraband removed from arrestees, clearly establish reasonable suspicion that this class of persons will be found to carry contraband. The standard of a reasonable suspicion (if any reasonable suspicion is necessary to conduct a search), constitutes a much more reliable criteria than compelling the jail guards to guess on a case by case basis, which person is most likely to carry contraband on and in his/her body.

A Second Circuit's previous decision regarding visual body cavity searches has been reversed by this Court in *Bell v. Wolfish, supra,* yet the court refused to follow the direction given by this Court both in *Bell v. Wolfish* and in *Block v. Rutherford,* 104 S.Ct. 3227, regarding visual body cavity searches and security responsibilities in the jails.

In the case of *Block v. Rutherford,* 104 S.Ct. 3227, the U.S. Supreme Court reiterated its decision in *Bell v. Wolfish* and stated that:

> 'We sustained against a Fourth Amendment challenge the practice of conducting routine body cavity searches following contact visits, even though there have been only one reported attempt to smuggle contraband to the facility in a body cavity".

The Supreme Court discussed the purpose of the cavity searches and stated that it was to discover and deter smuggling of weapons and contraband which was found to be a by-product of contact visits. The Court found that given the security demands and the need to protect not only other inmates but the facility's personnel, they did not regard "full body cavity searches as excessive".

Thus, in a decision as recent as July 1984, the Supreme Court reiterated once again the constitutionality of body cavity searches and reiterated their decision in *Bell v. Wolfish,* 441 US 520, which so held in 1979.

Body cavity searches in general have been upheld in numerous cases and in particular in *Bell v. Wolfish,* 441 US 520; 99 S.Ct. 1861 and *Block v. Rutherford,* 104 S.Ct. 3227.

In *Bell v. Wolfish,* the District Court upheld a strip search procedure of detainees but prohibited body cavity searches absent probable cause to believe that the inmate is concealing contraband. Because petitioners in that case proved that in only one instance in the jail's short history contraband was found during a body cavity search, the Court of Appeals, (2nd Cir.), affirmed the decision.

The U.S. Supreme Court in reversing the Second Circuit's decision stated that the Second Circuit found that the "gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility."[4] The Supreme Court stated that admittedly the practice instinctively 'gives us the most pause', but continued:

> "However, assuming for present purposes that inmates both convicted prisoners and pretrial detainees retain some Fourth Amendment rights upon commitment to a corrections facility, *we nonetheless conclude that these searches do not violate that Amendment.* The Fourth Amendment prohibits only unreasonable searches, and under the circumstances we do not believe that these searches are unreasonable". (emphasis supplied), Id 558.

Thus, *Bell v. Wolfish* specifically states that body cavity searches are not unreasonable and do not violate the Fourth Amendment. The Court continued and stated at page 520:

> "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical applica-

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[4] Perhaps it was because of that language that the Second Circuit chose to disregard the evidence that a substantial number of people (70%) are found to carry contraband into the jail, which would then, even by their own standard, compel them to a result they evidently did not wish to come about.

> tion. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for imitating it, and the place in which it is conducted. *A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contrabands is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record and in other cases.* That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterent than to any lack of interest on the part of the inmates to secrete or import such items when the opportunity arises". (emphasis supplied), Id 559.

As to whether body cavities searches can be conducted on less than probable cause, the Supreme Court resoundly stated:

> "Balancing the significant and legitimate security interests of the institution against the privacy interest of the inmates we conclude *that they can*". Id 560.

In our case, there is no question that the visual body cavity searches are reasonable. There is uncontroverted testimony by Sheriff Meloni and Sgt. Craven that 70 percent of the arrestees who are subjected to body cavity searches are found to carry on and *in* their bodies, dangerous contraband, namely weapons, guns, knives, and illegal drugs. The testimony was also uncontroverted that this percentage is without regard to the charge against the person. The testimony was that the same percentage applies to people who are arrested for traffic violations as to those who are arrested for other more serious charges. Also, Sergeant Craven's affidavit stated, based on her own experience in the jail, that prisoners come in with weapons and other dangerous instruments and drugs hidden upon their bodies, even if they are only charged with traffic violations.

The Second Circuit refused to accept Mr. Meloni's testimony

as valid, and ignored Ms. Craven's testimony. The Second Circuit objected to the District Court's reliance on the affidavit of Mr. Meloni inasmuch as it is "a conclusory estimate based neither on personal observation nor on an analysis of the jail records". Mr. Meloni testified that his affidavit was based on figures given to him by jail administrators and jail guards and as such his testimony is admissible under the federal rules of evidence. Of course, if the affidavit was insufficient, then it was incumbent upon the Second Circuit to return the matter to the court below for the introduction of statistics and testimony by people who have personal observations (such as Sgt. Craven whose testimony was ignored by the Second Circuit) before summary judgment was granted against the petitioners. The record in the court below also included photographs of items removed during searches from arrestees and were before the District Court and the Second Circuit. Even though no specific studies were conducted, the information conveyed to the courts is within the knowledge of the people who are in the business of running the jail. In *Bell v. Wolfish, supra* the Supreme Court stated that it did not underestimate the degree to which body cavity searches may invade the right of privacy of inmates. Yet it concluded that in balancing the significant and legitimate security interests of the institution against the privacy interest of the inmates, that these searches must go on. Nor did the Supreme Court find that such security restrictions constituted punishment in violation of other rights of the detainees. In *Block v. Rutherford,* 104 S.Ct. 3227, the Supreme Court reiterated its findings in *Bell v. Wolfish* that body cavity searches are proper and brushed aside the proposition that such searches be implemented only as to those inmates who may be suspected of smuggling drugs, weapons, and other contraband into the jail. The Court stated that identification of those inmates who have propensities for violence, escape or drug smuggling is a difficult if not impossible task, and the chances of mistaken identification are substantial. Interestingly, the Second Circuit decided as a major criteria for permissibility of visual body cavity searches that the characteristic of the person should

be considered when determining whether a search should be conducted, even though this particular criteria was rejected specifically by this court in *Bell v. Wolfish*. This Court has reiterated in *Block v. Rutherford* that full body cavity searches are reasonable when they are taken to protect the inmates and the personnel in the jail and to deter smuggling of weapons and contraband. The Second Circuit relied on *United States v. Montoya De Hernandez,* 105 S.Ct. 3304, 3310 for the proposition that "particularized suspicion" must be present in order to permit body cavity searches. The Second Circuit misunderstood the decision in Montoya wherein this court specifically held in a footnote at Page 3311: "It is also important to note what we do *not* hold. Because the issues are not presented today, we suggest no view on what level of suspicion, if any, is required for non-routine body searches, such as strip, body cavity, or involuntary x-ray searches. . .". Furthermore, this court held that the words particularized suspicion mean nothing more than reasonable suspicion and that no additional level between reasonable searches and probable cause searches is required for searches on the border. The Second Circuit reliance on that case is therefore misplaced.

In view of Sheriff Meloni's and Sgt. Craven's testimony that over 70 percent of arrestees, *regardless of charge,* are found to carry contraband on and *in* their bodies, it appears that the procedure even if applied to traffic violators, of which Mrs. Weber was *not* one, is reasonable and proper and in line with the Supreme Court decisions.

The Supreme Court stated in the *Block* case:

> "In any event, we have emphasized that we are unwilling to substitute our judgment on this difficult and sensitive matters of institutional administration and security for that of "the persons who are actually charged with and trained with the running", of such facilities".

The Court also stated in *Block*:

> "We can take judicial notice that the unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country".

This court can take judicial and public notice of the fact that unauthorized use of narcotics plagues not only penal institutions but many levels of society. Attorneys, doctors, laborers, housewives, and kids are using illegal drugs and carry them on their bodies. Especially a woman in an evening gown, who has neither pockets nor purse.

The Supreme Court found in Block that the court's attempt to balance several rights resulted in impermissible substitution of its view on the proper administration of the Jail for that of the experienced administrators of that facility. The Court specifically stated:

> "Here, as in Wolfish, "It is plain from (the) opinions that the lower courts simply disagreed with the judgment of the jail officials about the extent of the security interests affected and the means required to further those interests", 441 US at 544.

The Supreme Court refused to allow the lower courts to disagree with the judgment of jail officials and to implement their opinions instead.

The Supreme Court specifically held that body cavity searches are proper when they are required for the safety of the jail. Sgt. Craven's and Sheriff Meloni's uncontradicted testimony specifically indicate that such is the case.

The decision of the Second Circuit in this case conflicts not only with this court's decisions, but even with its own previous decision rendered by it in 1984 in the case of *Security and Law Enforcement Employees, et al v. Cary, et al,* 737 F.2d 187. The Second Circuit in addressing the issue of conflict with its own decision merely states that the search in the case at bar took place

before they rendered their decision in Security and Law Enforcement Employees. The court does not explain the conflict, but brushes aside the conflict by the statement above.

In the case of *Security and Law Enforcement Employees, et al. v. Cary, et al.*, 737 F2d 187 (1984), the Second Circuit dealt with the question of body cavity searches. In that case, the practice in the jail was to strip search and conduct body cavity searches of *correction officers.* The Court stated at page 191:

> " Once contraband including drugs, money, weapons, and other items, is introduced into the prison environment, the order and routine that must be maintained to achieve stability and security in these facilities is apt to be undermined and disrupted. The consequences can place the lives and wellbeing of both staff and inmates in serious jeopardy."

The Court then entered into a discussion of the Fourth Amendment rights as it related to correction officers and stated:

> "The purpose of the Fourth Amendment is to protect people from arbitrary and oppressive governmental conduct". Id 201.

The Court continued that the Fourth Amendment vests individuals with the right to be free from "*unreasonable* government intrusions into the legitimate expectations of privacy", *US vs. Chadwick,* 433 US at 7.

All agree that the Fourth Amendment prohibits only unreasonable searches. Therefore, the test in a Fourth Amendment case is whether the search was reasonable. To determine reasonableness, the court must balance the intrusiveness of the search on the individual's Fourth Amendment interest against promotion of legitimate governmental interests.

The Court in *Security and Law Enforcement Employees, et al* stated that the first examination of the reasonableness of the search has to be the intrusion on the individual's Fourth Amendment interest and that such examination must be taken in the

context of the individual's legitimate expectation of privacy. The Court then went to state that correction officers, *'none of whom were under arrest for a criminal charge"* had an expectation of retaining their privacy (though a diminished expectation in view of their work). Id 201. Thus, the Second Circuit recognized that individuals who are arrested and charged with a crime, and Mrs. Weber was charged with the crime of resisting arrest, a serious charge by all means, (whether done in an evening gown or a studded leather jacket) do not have the same expectations of privacy as citizens at large, nor does society accept that they will have the same expectations, nor would it be reasonable to expect that society be prepared to recognize the proposition that people who are arrested and charged with crimes have the same expectations of privacy as people on the outside.

The Court addressed the question of whether or not there was a legitimate government interest justifying the body searches of the correction officers. The Second Circuit reiterated the finding that: "Central to all other correctional goals is the institutional consideration of internal security within the corrections facilities themselves". The Court further stated that incidents in which inmates have obtained drugs, weapons and other contraband are well documented in case law and regularly receive the attention of the news media. They recognized that the security problems faced by prison administratives are difficult, complex and challenging and thus agreed that it is fundamental that the courts recognize the legitimate penalogical imperatives of maintaining prison security and preserving internal order and discipline. Id 203. The Court found, in that case, that strip searches of correction officers is permissible without a warrant, however, they did find that body cavity searches of correction officers could not be conducted without a warrant inasmuch *as they were not charged with a crime.*

If correction officers can be subjected to strip searches without probable cause, and if body cavity searches may be conducted on

them based on probable cause, there is no doubt that inmates and arrestees certainly can be subjected to body cavity searches as long as there is a reasonable and legitimate purpose to the search.

Thus, it is clear that the Courts recognize the body cavity searches as constitutional and reasonable, even if they detest the idea of such searches. Yet, in this case the court chose to declare them unconstitutional.

The Second Circuit stated that examination of cases from other circuits support their view that *Block and Wolfish* do not permit the result arrived at by the District Court in this case, where the District Court held that the search was constitutional. They relied on ten opinions from seven circuits that preceded *Block v. Rutherford,* but which were post Wolfish and carved exceptions to Wolfish. The court concedes that only four of the cases were decided after Block and relied on those cases for the proposition that body cavity searches should not be permitted.

However, in none of those cases was there any testimony that persons are found to carry contraband when brought into a jail regardless of the offense for which they are arrested.

Furthermore, even in these four cases, there is a conflict among the circuits. The Fifth Circuit held that a reasonable suspicion standard is *insufficient.* The Seventh Circuit held that it is sufficient. The results vary, lives may be endangered, and it is of the utmost importance that this court set a standard which can then be applied uniformly throughout the county.

While in our case it is obvious that all arrestees are searched pursuant to a state policy, it is also clear that there exists a reasonable suspicion of that class of persons that when they enter the jail, they carry contraband in the form of weapons, drugs or otherwise which may endanger the lives and safety, not only of the jail guards, but also of other arrestees and inmates. In none of the cases cited by the Second Circuit was there any evidence as to the number of persons who are found to carry contraband when

arrested. Not only is there a conflict among the circuits as to the constitutionality of searches, (while the Supreme Court clearly held them as constitutional), but in *Jones v. Edwards,* 770 F2d 738, the Eighth Circuit distinguished between strip searches of those arrested for traffic violations and those charged with resisting arrest, or public misconduct which the Court decided *will* justify a more intrusive search. Several courts have also upheld visual body cavity searches against constitutional challenges under any circumstances. *Daughtry v. Harris,* 476 F2d 292; *cert. denied* 414 US 872; *Hodges v. Klein,* 412 F. Supp. 896 and others.

Arrestees whose bail is forthcoming are generally not searched, but are kept in the holding cells for as long as possible. Of course the waiting time depends on space. Only if they have to wait for bail and the holding cells are crowded to the point where it interferes with the booking process will an arrestee be placed in a cell, and even this is changing. With new construction which would provide more holding space, hopefully, there will be no need for strip searching of arrestees who can come up with bail even if there are extensive delays in their release.

But, until such time, if the arrestees cannot be placed in a holding cell where they are continuously under observation, they must be searched before being placed in the cell in view of the statistics provided and the security concerns for inmates and guards. If the policy is struck down, the jails will become unsafe for all.

The Second Circuit in its conclusions held that they recognize the need for body cavity searches and strip searches, but decided as a matter of law, that a person accused of a misdemeanor cannot be searched unless the guards have a reasonable suspicion based on the traits of the individual that he may be carrying contraband. Such standard is unreasonable and was specifically rejected by this court in *Bell v. Wolfish* and *Black v. Rutherford, supra.*

NEITHER THE COUNTY OF MONROE NOR THE SHERIFF EVER PROMULGATED THE STRIP SEARCH POLICY AT THE CITY LOCKUP

Both the Second Circuit and the District Court have taken the position that the Sheriff and the County have conceded that it is a Sheriff's policy which controls the body cavity searches of inmates. Such is not the case.

Article XVII Section 5 of the New York State Constitution established a State Commission of Correction and this body has the only authority to promulgate rules and regulations establishing minimum standards in jails including minimum standards for admission procedures.

The State Commission of Corrections did establish minimum standards for jails and also established minimum standards for admission procedures to the City lockup. New York Code of Rules and Regulations Title 9, Section 7502.1 states:

> "Admission Procedure. (a) Before being placed in a cell or detention room, the clothing and *person* of each prisoner shall be thoroughly searched" (emphasis supplied).

Section 7502.1(d) states:

> "Searching of a female prisoner shall be accomplished by a regularly appointed police matron, or other qualified female person whose services may be available on a part time basis".

The State also issues material for training police officers in body cavity searches of arrestees and also provides the Sheriff with a movie showing how to conduct such a search.

The Sheriff testified that he had no option but to comply with the State mandate which is interpreted as requiring body cavity searches of prisoners by *every* jail in the State of New York.

He also testified that neither he nor the County promulgated the strip search policy.

The Court of Appeals of the State of New York in the case of *Matter of County of Cayuga v. McHugh,* 4 N.Y.2d 609 defined a County as "a municipal corporation compromising the inhabitants within its boundaries and formed for the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as may be enforced or confined upon it by law".

The Court also stated that counties, as civil divisions of a State, had their origins in England and were formed to aid in the more convenient administration of government.

The Court further stated the counties are mere political subdivisions of the state, created by the State Legislature and possessing no power save that defuted to them by that body.

The Court stated at page 614 that insofar as political and governmental powers of a County are concerned, it is clear that the County is an agent of the State and as such is subject to the control of the legislature. The Court also stated that the State Legislature has the right to take onto itself direct control of matters relating to local government.

The Court stated at P. 615:

> "It follows that if the Legislature may abolish County jails altogether it may also set up standards for the maintenance of such institutions and methods to ensure that those standards are met. To that end, carrying out the mandate of Section 5 of Article XVII of the New York State Constitution, the Legislature has delegated to the State Commission of Correction by Subdivision 8 of Section 46 of the Correction Law the duty of inspecting all penal institutions of the State and, to insure that Counties are not recalcitrant in maintaining these jails in the required condition, it has empowered the commission to close any jail. . ."

The Appellate Division, Third Department, stated in the case of *McNulty v. Chinlund,* 62 A.D.2d 682, that:

> "there is no doubt that the rule making power conferred

> upon the Sheriff as jail keeper. . .is curtailed or diminished by Subdivision 6 of Section 45 (of the Correction law). This, however, is within the power of the Legislature. The Legislature conferred upon the (New York State Commission of Corrections) the power to establish 'minimum standards'. . ."

Thus, no action may be maintained against the County or the Sheriff on the ground that it is *their* policy which is followed in the jail, when it is clear that whatever rules were promulgated were promulgated by the State of New York and imposed upon the Sheriff who is the custodian of the jail, and that the County has no say in the procedures established for the jail.

In our case, it is the state which gave the sheriff authority over the jail, and it was the state which mandated the body cavity search policy which the sheriff had no choice but to follow. The Second Circuit decided that it is a County policy which was implemented in the jail.

The Second Circuit rejected petitioners' argument that the Sheriff's policy is mandated by New York Administration Code Title IX §7502.1(a) which provides that "before being placed in a cell or detention room, the clothing and person of each prisoner shall be thoroughly searched". The court held that it was the sheriff's interpretation of the rule which required body cavity searches. This is erroneous. It ignores the record which clearly shows that it is mandated by the State which not only provides the training manuals to the Sheriff, but that such training manuals and films include visual body cavity searches. It also ignores the testimony that each and every jail in the state interprets the rule as requiring body cavity searches.

THE SHERIFF IS ENTITLED TO GOOD FAITH DEFENSE AND QUALIFIED IMMUNITY

The Second Circuit denied Sheriff Meloni good faith immunity on the ground that at least eleven circuit court decisions

(eight of the decisions were decided after the date of the search in this case) hold similar policies unconstitutional. The Second Circuit states that only three of the decisions antedated the search in this case. The three decisions also conflict as to the criteria to be applied. Furthermore, none of these cases applied to the State of New York. The Second Circuit held that the sheriff is not entitled to good faith immunity because even though they have not directly ruled on the issue presented in this case, they have previously described in *Sostre v Preiser,* 519, F.2d 763 "the indignities of a rectal search" (which of course was not conducted in this visual cavity search) as insensitive, demeaning and stupid and further held in *Sala v. County of Suffolk,* 604 F.2d 207, vacated and remanded 446 US 903 searches as "degrading". The court held that this should have alerted Sheriff Meloni that the body cavity search policy was unconstitutional.

The Second Circuit agrees that there is not one case which prohibits body cavity searches of persons charged with resisting arrest, but nevertheless stated that because the policy here is not restricted only to persons charged with resisting arrest, that therefore the sheriff lacks good faith immunity, even though the only issue before the court dealt with a person charged with resisting arrest.

In *Harlow v. Fitzgerald,* 457 U.S. 800, the Supreme Court held that a good faith defense bars an action against the official.

There is no question that the sheriff acted in good faith and, therefore, Sheriff Meloni must be immune from suit. There is no question that there is not one single case which decided that a body cavity search of a person charged with resisting arrest is unconstitutional.[5]

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[5] The Second Circuit agreed with that statement, but nevertheless held that based on their general attitude to body cavity searches, the sheriff should have known that the search will be held unconstitutional.

The cases which held the searches to be unconstitutional were not second circuit cases and do not apply to our area. They are also in controvention of the Supreme Court rulings in *Bell v. Wolfish, supra* and *Block v. Rutherford, supra.*

In *Harlow v. Fitzgerald* the Supreme Court stated at 819:

> "Where an official could be expected to know that certain conduct will violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action an which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences".

Additionally the Court stated:

> "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful". Id 818.

The Second Circuit in the case of *Security and Law Enforcement Employee v. Cary,* 737 F2d 187 stated at page 211:

> "Our recent decision in *McCann v. Coughlin,* 698 F2d 112, a post Harlow case, discusses similar principals. In McCann, we concluded that: '(o)fficials are not required to predict future developments and constitutional adjudication, and can be held liable only for actions which were unlawful at the time in issue," Id. at 124, and that prison officials have a "right to qualified immunity for actions taken in their official capacity if they act in good faith and on the basis of a reasonable belief that their actions were lawful". Id.

In that case, the Court found that correction officials were entitled to good faith defense and qualified immunity because in 1983 there was no established case law that determined that body

cavity searches of corrections officials was unconstitutional without a search warrant and on less than probable cause, and barred any action against them.

Also, if there was no case law that prohibited body cavity searches of corrections officers in 1983, the time of this incident, certainly there was no case law that prohibited body cavity searches of inmates. Had there been established case law that prohibited body cavity searches of inmates at that time, certainly it would stand to reason that body cavity searches of corrections officers would have been deemed to have been prohibited under *established law.* But the Court did not so hold.

Furthermore, the Second Circuit determined that because the defendants there acted in good faith in reliance on the Department of Corrections rules and regulations in effect at the time, they were entitled to good faith immmity, just as the Sheriff is here, as he relied on rules and regulations of the Department of Corrections.

Of course, Sheriff Meloni felt that he had no choice but to implement the state rules and thus is entitled to immunity, *Wallace v. King,* 626 F2d 1157, 1161.

If there was no case which held unconstitutional searches of persons charged with resisting arrest, and if there was an Eighth Circuit case which permitted such search, then how can it be said that the sheriff did not act in good faith?

THE COUNTY IS NOT RESPONSIBLE FOR THE ACTS OF THE SHERIFF

Article XIII, Section 13 of the Constitution of the State of New York which was adopted prior to the legislation of 42 USC 1983, states that "a County shall never be made responsible for the acts of the Sheriff".

There are many reasons for the adoption of that section of the Constitution of the State of New York, but the most important one is because of the many functions performed by the sheriff. The sheriff is an officer of the court, he represents the interests of the State of New York, and in addition, he is a constitutional officer who is also a law enforcement officer within a county.

The Second Circuit states that the county has not provided any authority for the proposition that the sheriff as the highest ranking law enforcement official in the County was not entitled to establish policy for the Monroe County Jail. Obviously, the sheriff who was entrusted with the custody of the jail by the state, has the authority to establish policy for the jail. Also obvious is his testimony and the law which state that the State of New York has the ultimate power to establish policy. The sheriff can only implement the policy established by the state, as he had done in this case. The sheriff, however, is not a municipal official, but is a constitutional officer whose job was created by the Constitution of the State of New York and is to be distinguished from the office of the County Attorney who is a municipal official. *Barr v. County of Albany,* 50 NY.2d 247, *Wilson v. Sponable,* 81 A.D.2d 1.

It has also been established that the doctrine of respondeat superior is a question of state law. *Meredith v. State of Arizona,* 523 F2d 481, *Tuley v. Heyde,* 482 F2d 590, *Hesselgesser v. Reilly,* 440 F.2d, 901, *Logan v. Shealey,* 660 F.2d 1007, 1015.

The Courts have determined that no respondeat superior liability exists as far as municipalities are concerned except where municipal policy is followed. *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 691-95. *Owen v. City of Independence,* 445 U.S. 622, *Ellis v. Blum,* 643 F2d, 68, *Johnson v. Glick,* 481 F2d, 1028, cert. denied 414 U.S. 1033.

Inasmuch as neither the County nor the sheriff establish policy or minimum standards for admission to the jail and inasmuch as no respondeat superior liability exists between the Sheriff and the

County, there cannot be an action against the County under respondeat superior theory in a §1983 action, and this action may not be maintained against the County.

In order to bind the County, a policy must be promulgated on behalf of the County only by those who are authorized to bind the County, and who have, under State law, final policy making authority, *Pembaur v. City of Cincinnati,* 106 S.Ct. 1292. The Sheriff in the State of New York, does not fall under this category. While he has authority to make certain policies in the jail and is mandated to implement state policies therein, he cannot under state law bind the county. In *Blackburn v. Snow,* 771 F.2d 556, cited by the Second Circuit, it was the Sheriff who promulgated the policy, not the state as is the case here.

Inasmuch as the doctrine of respondeats superior is a question of state law, the Court of Appeals was bound by the decision of the New York State Court of Appeals in *Barr v. County of Albany,* 50 N.Y.2d 247 which holds that the County cannot be made responsible for the acts of the sheriff.

CONCLUSIONS

The question of the constitutionality of visual body cavity searches is an important question affecting the lives of inmates, jail guards and perhaps the whole community. This court has ruled many times that security questions in administration of a jail should best be left to those who have the expertise to run the jail. Federal courts consistently refuse to listen and have attempted to impose their opinions and decisions on jail administrators sometimes with disastrous results.

This case gives this court an opportunity to establish the constitutionality and criteria, if any, to be applied in conducting visual body cavity searches, so that all circuits and all courts can follow one standard.

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANN WEBER and GARY J. WEBER,
Plaintiffs,

v.

ELIZABETH DELL, OFFICER JANSSEN REMBERT, INVESTIGATOR MICHAEL CIMINELLI, SGT. R. HARE, OFFICER SUE SHANNON, OFFICERS JOHN DOE, JANE DOE and other unidentified police officers, THE CITY OF ROCHESTER POLICE DEPARTMENT, THE CITY OF ROCHESTER and THE COUNTY OF MONROE, and ANDREW P. MELONI, MONROE COUNTY SHERIFF,
Defendants.

CIV-84-1041T

DECISION and ORDER

This is an action brought by plaintiffs against the City of Rochester, several of its police officers and one of its police dispatchers, for injuries arising out of their arrest. Plaintiffs also seek damages from the Count of Monroe and its Sheriff, Andrew Meloni for the alleged violation of plaintiff Ann Weber's constitutional rights as a result of her being forced to undergo an illegal strip search and body cavity search at the Monroe County Jail on June 19, 1983. Pending before me are motions by the County and the Sheriff for summary judgment, and a cross-motion by the plaintiffs for partial summary judgment against those defendants. I hold that the plaintiffs' constitutional rights were not violated by the County or the Sheriff as claimed, and therefore grant the County's and the Sheriff's motions for summary judgment and deny the plaintiffs' cross-motion for partial summary judgment.

FACTS

For purposes of this motion, I rely upon the following limited description of the facts of the case which are gleaned from the papers and affidavits supplied by the parties. The City of Rochester chose not to participate in these motions presumably because they dealt only with defendants County of Monroe and Sheriff Meloni.

On June 18, 1983 Ann Weber was arrested for charges of resisting arrest and for making a false report of a shooting. Her husband Gary Weber was arrested at the same time and charged with obstruction of governmental administration.[1]

The alleged false report was made in order to induce the police to answer a call for assistance when a previous call reporting an episode of malicious mischief went unanswered. For the purposes of this motion it is relevant to point out only that Mrs. Weber was taken by the police at approximately 3:00 A.M. to the Monroe County lockup where she was placed in a holding cell, then booked.

Erlier that evening Ann Weber's daughter, Marilyn Mogenhan had been married in the City of Rochester. When placed in the lockup, Mrs. Weber was still wearing the formal wedding attire she had worn to her daughter's wedding earlier that evening. After she was booked, she was not taken back to the holding cell where arrestees awaiting bail are normally kept. Instead, apparently because the holding area was full, she was taken to a cell in an area of the Monroe County Jail where arraigned pre-trial detainees are housed.

A jail matron then ordered Mrs. Weber to remove all of her clothing. After she did so, she was ordered to alternately face toward and away from the female jailer and bend at the waist. While bending, she was ordered to "spread her cheeks" while the

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[1] Both plaintiffs were later acquitted of all charges after trial in Rochester City Court Court.

jailer visually inspected her rectal and vaginal areas. After this search, she was placed in a cell for less than 30 minutes until her daughter arrived to post bail. Prior to this episode, she had never been arrested.

After Mr. Weber was booked he was taken to a hospital where he was treated for wounds to his face.

The strip search of Mrs. Weber had been conducted pursuant to a County Jail policy under which any arrestee placed in the County Jail (other than those in the holding area) was strip searched and body cavity searched. The County and the Sheriff claim that this blanket strip/cavity search policy was required by 9 NYCRR § 7502.1(a), which states that, "Before being placed in a cell or detention room, the clothing and person of each prisoner shall be thoroughly searched." At oral argument, the County attorney conceded that the phrase "thoroughly searched" did not necessarily require a strip/cavity search, but that the County Sheriff had interpreted the regulation in that manner, as had other jail administrators in the State.

Plaintiff originally instituted this action against Elizabeth Dell, the City, the police officers, and Monroe Count. After the County moved for summary judgment, in part because New York Constitution Article XIII, § 13 forbids imposing liability upon the County for the acts of the Sheriff (*see Barr v. County of Albany,* 50 NY2d 247 (1980)), plaintiffs moved for leave to add the County Sheriff as a defendant, which leave was granted. The County has renewed its motion for summary judgment based on Article XIII, and also argues that the strip search policy was constitutional, and that (if the policy was not constitutional) the County is nevertheless immune from damage liability because the Sheriff adopted the policy in good faith reliance upon *Bell v. Wolfish,* 441 U.S. 520 (1979). The Sheriff has also moved for summary judgment, raising the same arguments raised by the County (except Article XIII). Plaintiffs have cross-moved for partial summary judgment against the County and the Sheriff,

relying on cases from several circuit courts of appeals holding that a blanket strip search policy is unconstitutional.

As set forth below, I hold that the strip search policy implemented by the Sheriff is constitutional under the authority of *Bell v. Wolfish* and its progeny, and I grant summary judgment to the County and the Sheriff on that authority.

DISCUSSION

The plaintiffs in *Bell v. Wolfish* challenged numerous conditions of their confinement at the pre-trial detention facility in New York City and various policies and practices of that institution. The Supreme Court sustained against a Fourth Amendment challenge the practice of conducting routine body cavity searches of these pre-trial detainees following contact visits even through there had been only one reported attempt to smuggle contraband into the facility in a body cavity. 441 U.S. at 558-560. Although the Court admitted that the practice of conducting these searches "instinctively [gave it] the most pause," *id.*, it balanced this against the prison's interest in maintaining security, and concluded that this practice did not violate the Fourth Amendment. The balancing test it applied is worth quoting at length:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiation of it, and the place in which it is conducted. A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility are documented in this record, and in other cases. That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to

> the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.

441 U.S. at 559 (citation omitted).

The Court stated specifically that probable cause was not required before a body cavity search could be conducted on these inmates. 441 U.S. at 560. The Court also stated that the existence of less intrusive and equally effective alternatives to body cavity inspections did not render such inspections unconstitutional under the Fourth Amendment, as long as the alternative chosen by the prison administrators was not irrational or unreasonable. 441 U.S. 559, n. 40.

The Court added a gloss to *Bell v. Wolfish* in the 1984 case of *Block v. Rutherford,* 104 S.Ct. 3227. *Block* was a Fourteenth Amendment case rather than a Fourth Amendment case, because in *Block* the prison administrators had chosen to ban contact visits entirely, rather than conduct any searches of inmates returning from contact visits. In *Block,* the Court again emphasized that it was unwilling to substitute its judgment on the difficult and sensitive matters of institutional administration and security for that of the persons who were actually charged with and trained in the running of such facilities. 104 S.Ct. at 3233. It took judicial notice that the unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country, then reversed the District Court's decision holding that a limited program of contact visits was constitutionally required:

> On this record, we must conclude that the District Court simply misperceived the limited scope of judicial inquiry under *Wolfish.* When the District Court found that many factors counseled against contact visits, its inquiry should have ended. The Court' further "balancing" resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility. Here, as in *Wolfish,* "[i]t is plain from [the] opinions that the lower court simply disagreed

> with the judgment of [the jail] officials about the extent of the security interests affected and the means required to further those interests." 441 U.S., at 554, 99 S.Ct., at 1882.

104 S.Ct. 3234.

Regardless of my personal feelings concerning the strip search and cavity search performed in this case and the policy established which led up to that search, I am compelled to follow the direction announced by the Supreme Court in deferring to the judgment of those entrusted with administering the jail, in this case the Sheriff of Monroe County. The Supreme Court has very recently reaffirmed that policy of deference to the decisions of prison administrators on security matters in *Whitley v. Albers*, No. 84-1077 (Mar. 4, 1986). The message from the Supreme Court is clear: a district court should not substitute its view on the proper administration of a jail ". . . for that of the experienced administrators of that facility" simply because the Court may disagree with the "judgment of [the jail] officials . . .". *Block v. Rutherford, supra,* 104 S.Ct. at 3234.

Plaintiffs rely on a host of cases from circuit courts other than the Second Circuit (most of which predated *Block v. Rutherford*), in which the balancing test of *Bell v. Wolfish* was applied, and in which the circuit courts concluded that blanket strip/body cavity searches of all pre-trial detainees were unreasonable. *Tinetti v. Wittke,* 479 F. Supp. 486 (E.D. Wisc. 1979), *affd.*, 620 F.2d 160 (7th Cir. 1980); *Tikalsky v. City of Chicago,* 687 F.2d 175 (7th Cir. 1982); *Logan v. Shealey,* 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub nom. Clements v. Logan,* 445 U.S. 942 (1982); *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir. 1983); *Stewart v. Lubbock County, Texas,* 767 F.2d 153 (5th Cir. 1985), *cert. denied sub nom Lubbock County v. Stewart,* No. 85-1241 (Mar. 10, 1986); *Levka v. City of Chicago,* 748 F.2d 421 (7th Cir. 1984); *Hill v. Bogans,* 735 F.2d 391 (10th Cir. 1984); *Giles v. Ackerman,* 746 F.2d 614 (9th Cir. 1984), *cert. denied,* 105 S.Ct.

2114 (1985); and *Jones v. Edwards,* 770 F.2d 739 (8th Cir. 1985); *see also Dufrin v. Spreen,* 712 F.2d 1084, 1088 (6th Cir. 1983).

In all of these cases, the circuit courts refused to condone strip/body cavity searches of *all* arrestees entering a jail. These courts refused to allow searches of misdemeanants (or even felony offenders) unless there was "reasonable suspicion" or other circumstances (such as the nature of the crime with which the arrestee had been charged) which would lead a reasonable prison administrator to suspect that the particular arrestee might be concealing contraband in a body cavity.

After *Bell* and *Block* I cannot adopt the reasoning of these circuit courts. Instead, I am led to the inescapable conclusion that, once a person becomes a prison inmate, he or she loses any Fourth Amendment protection from strip/body cavity searches if prison administrator have reasonable grounds for concluding that the inmate is in a position to be carrying contraband. In this case, County Sheriff Meloni testified that it was his experience and that of his deputies that approximately 70% of the arrestees who are strip-searched prior to admission to the County Jail are carrying material that is classified as contraband, either on their clothing or on their persons. Although the Sheriff's figures were only rough estimates, and did not differentiate between items found in the clothing and items found in body cavities, his figures are sufficient to indicate that there is a considerable problem with arrestees carrying contraband. Moreover, in the experience of other courts, *see, e.g., Bell v. Wolfish, supra,* 441 U.S. at 559; *Mary Beth G. v. City of Chicago, supra,* 723 F.2d at 1271-73, there is indeed a problem with at least *some* arrestees concealing contraband in body cavities. Given that assumption, I cannot, after *Block v. Rutherford,* substitute my view on the proper administration of the County Jail for that of Sheriff Meloni.

Although the balancing test in *Bell v. Wolfish* used words such as "each case," "particular search," and "particular intrusion," the Court evidently was not so much concerned with each indi-

vidual's search as with the prison's policy of searching a given *group* of inmates (in that case, inmates returning from contact visits). This emphasis is even more evident in *Block v. Rutherford,* in which the Court refused to require prison administrators to differentiate among candidates for contact visitation, identifying those inmates with propensities for violence, escape or drug smuggling.[2] I read these cases as holding that, once I have determined that the Sheriff has properly concluded that a given *group* of inmates (here recent arrestees) poses a threat of smuggling contraband, I must determine that he is justified in searching any *individual* member of that group, even (after *Bell v. Wolfish*) through means as intrusive as a visual body cavity search.

This reading of the cases is supported by Justice Rehnquist, the author of the *Bell v. Wolfish* majority decision, in his decision temporarily restraining the Fourth Circuit from enforcing its *Logan v. Shealey* decision, *supra.* In *Clements v. Logan,* 454 U.S. 1304 (1981), Justice Rehnquist described the Fourth Circuit's decision as "so at odds with this Court's resolution of a similar issue in *Bell v. Wolfish*" that the extraordinary remedy of a temporary stay should be granted, even though a request for the same stay had already been denied by Chief Justice Burger. 454 U.S. at 1308-09. Justice Rehnquist stated that the position of Ms. Logan (who was awaiting release after having been arrested for driving while intoxicated) was no different, for constitutional purposes, from that of the pretrial detainees in *Bell v. Wolfish.* 454 U.S. at

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[2] This same distinction (between inmates as a group, instead of individually) is also noted by the First Circuit in its interpretation of *Bell v. Wolfish. See Blackburn v. Snow,* 771 F.2d 556, 564-65 (1985).

The First Circuit, *in dicta,* indicates that is considers arrestees merely awaiting bail to have the same Fourth Amendment rights as prison guards, jail visitors, and other unincarcerated persons. *Id.,* at 565. As is evident from my decision, I disagree, at least when the arrested person must be housed in a cell near other inmates.

1309.[3] More importantly, he also stated that the result in *Bell v. Wolfish* was *not* predicated on a showing that searches were limited to those individuals whose alleged offenses were commonly associated by their very nature with the possession of weapons or contraband. 454 U.S. at 1301.[4]

This view is also supported to some extent by the Second Circuit's holding in *Security and Law Enforcement Employees, District Council 82 v. Carey,* 737 F.2d 187 (2d Cir. 1984). In upholding strip-searches of corrections officers in that case, the Second Circuit held that the individualized "reasonable suspicion" standard applied by the other circuits to strip/body cavity searches of inmates should govern strip searches of corrections officers working in correctional facilities. *Id.* at 204. The Second Circuit analogized the Fourth Amendment rights of correction officers to those of visitors to penal institutions, as recognized in

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[3] The opinion of the Fourth Circuit indicates that, unlike Mrs. Weber, Ms. Logan had already been ordered released on her own recognizance by a Magistrate, and was only prevented from leaving the policy station by a policy of holding D.W.I. arrestees for four hours to ensure their sobriety. She was not being kept in a jail cell near other inmates; she was strip-searched only when she went into the jail to use the only available telephone to have someone pick her up. Although other courts consider it irrelevant whether an arrestee was housed with prison inmates, *see Giles v. Ackerman, supra,* 746 F.2d at 618-19; *Hill v. Bogans, supra,* 735 F.2d at 394; *Smith v. Montgomery County,* 547 F. Supp. 592, 598-99)D. Md. 1982), I do not. If an arrestee need not come in contact with jail inmates, it undermines the "prison security" justification for any strip searches of that arrestee. Sheriff Meloni has implicitly recognized this. Arrestees awaiting immediate release on bail are ordinarily placed in a holding cell away from jail inmates, and are only pat-down searched before being placed in that holding cell because they will not come in contact with jail inmates.

[4] Justice Rehnquist's temporary stay was vacated two days later, 454 U.S. 1117 (1981), and certiorari was ultimately denied, 454 U.S. 942 (1982). The denial of certiorari has no binding precedential effect, *United States ex rel. Goldsby v. Harpole,* 263 F.2d 71 (5th Cir. 1959), *cert. denied,* 361 U.S. 838 (1959), and certainly the opinion of only one Supreme Court Justice on an application for stay is not binding precedent. I cite his opinion only to emphasize his interpretation of his *Bell v. Wolfish* decision.

Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982). *See also, Blackburn v. Snow,* 771 F.2d 556 (1st Cir. 1985; *Smothers v. Gibson,* 778 F.2d 470 (8th Cir. 1985). The Second Circuit noted that corrections officers as unincarcerated persons should possess higher expectations of privacy than incarcerated individuals, 737 F.2d at 201; *see also, Hudson v. Palmer,* 104 S.Ct. 3194, 3198-3202 (1984), and *Blackburn v. Snow, supra,* 771 F.2d at 563, implying that incarcerated individuals are not entitled to the protection of a "reasonable suspicion" standard (at least individually, rather than as a group).[5]

Mrs. Weber argues that she should not be treated like the pretrial detainees in *Bell* and *Block* because she was an arrestee who had not even been arraigned. She argues that arrestees such as she do not ordinarily plan their daily lives with the expectation of being arrested, and thus are far less likely to have concealed contraband in a bodily cavity than are those already detained persons who have just been able to visit with someone from outside the walls. *See Giles v. Ackerman, supra,* 746 F.2d at 617. She argues that a woman such as she, clad in an evening dress from her daughter's wedding and arrested on unjustified charges of resisting arrest, can never be reasonably expected to have concealed contraband in a bodily cavity. *See Dufrin v. Spreen, supra,* 712 F.2d at 1088.

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[5] The Second Circuit did differentiate between mere strip searches and visual body cavity searches, holding that corrections officers could not be forced to undergo the latter in the absence of probable cause. The Second Circuit based this distinction in part upon the greater intrusiveness of visual body cavity searches, and in part on the testimony of prison administrators that contraband had *never* been discovered in the anal or genital areas of corrections officers. 737 F.2d at 207-08. By contrast, prison officials in this case have stated that arrestees do smuggle contraband in body cavities, and for that reason the Supreme Court has upheld visual body cavity searches of inmates, in *Bell v. Wolfish.*

The Second Circuit also applied the "reasonable suspicion" standard to strip searches conducted at this country's borders. *United States v. Ogberaha,* 771 F.2d 655 (2d Cir. 1985).

The fact remains, however, that experience shows that there *are* arrestees who conceal contraband in body cavities and once inside the jail, these inmates pose a threat to security. A blanket strip/body cavity search program is an unquestionably effective way of stemming this flow of contraband. Despite my belief that less intrusive measures could be equally effective, I am precluded from substituting my judgment for that of Sheriff Meloni. *Bell v. Wolfish, supra,* 441 U.S. at 559, n. 40; *Block v. Rutherford, supra.*

I note once again that all arrestees are not ordinarily searched in this manner. It appears from the record that arrestees for whom release on bail is imminent are ordinarily returned to the holding cell, after having been only pat-down searched before their initial admission to the holding cell. (Meloni Deposition at 24-25; Craven Deposition at 16-18). Only if an arrestee cannot make bail immediately and cannot be returned to the holding cell for some reason (such as overcrowding) is she placed in a cell near the already-arraigned inmates and thus strip-searched in the interest of jail security. If this were not the case, I cannot say that my holding would be the same.

CONCLUSION

This holding should not be construed to give free license to implement a strip search/cavity search policy with no concerns for the Fourth Amendment rights of arrestees. Indeed, jail administrators should always be sensitive to the highly intrusive and demeaning nature of the strip search/body cavity search, and should keep in mind that nothing in the established law prohibits the exercise of discretion and restraint. Because of the deference given to prison administrators in this area, they have a greater obligation to be particularly sensitive to exercising discretion and restraint. Even in the context of preventing the introduction of contraband into the general prison population, the jail personnel in applying the rule should be made to be especially aware of the

tremendous potential for arbitrary or invidious infliction of unnecessary intrusions into a person's privacy and the ultimate effect it can have on his or her dignity.[6]

Accordingly, summary judgment is granted to defendants County of Monroe and Monroe County Sheriff Andrew P. Meloni, dismissing the complaint against them, and plaintiffs' cross-motion for partial summary judgment is denied.

ALL OF THE ABOVE IS SO ORDERED.

MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York,
March 11, 1986

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[6] I share the conclusions expressed in *Security and Law Enforcement Employees, District Council 82 v. Carey,* 737 F.2d 187 (2d Cir. 1984), that the visual body cavity search represents one of the most grievous offenses against personal dignity and common decency, and is "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission . . . ." *Id.* at 207, quoting Tinetti v. Wittke, 479 F. Supp. 486, 491 (E.D. Wisc. 1979), *affd.,* 620 F.2d 160 (7th Cir. 1980).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1329—August Term 1985

(Argued: May 19, 1986 Decided: November 6, 1986)

Docket No. 86-7214

ANN WEBER and GARY J. WEBER,

Plaintiffs-Appellants,

—against—

ELIZABETH DELL, OFFICER JANSSEN REMBERT, INVESTIGATOR MICHAEL CIMINELLI, SGT. R. HARE, OFFICER SUE SHANNON, OFFICERS JOHN DOE, JANE DOE, and other unidentified police officers, THE CITY OF ROCHESTER POLICE DEPARTMENT, THE CITY OF ROCHESTER and THE COUNTY OF MONROE, and ANDREW P. MELONI, MONROE COUNTY SHERIFF,

Defendants-Appellees.

Before:

OAKES, MESKILL, and MAHONEY,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Western District of New York, Telesca, J.

Reversed.

STEPHEN G. SCHWARZ, Rochester, New York (Faraci, Guadagnino, Lange & Johns, Rochester, New York, of counsel) *for Appellants.*

NIRA T. KERMISCH, Assistant Monroe County Attorney, Rochester, New York (Charles R. Valenza, Monroe County Attorney; Charles H. Miller, III, Assistant Monroe County Attorney, of counsel) *for Appellees.*

MAHONEY, *Circuit Judge*:

This case presents the constitutionality of a jail policy authorizing strip/body cavity searches of people arrested and booked into the jail, regardless of whether they are reasonably suspected of concealing contraband. Plaintiff Ann Weber, who was subjected to such a search after her arrest on misdemeanor charges, and her husband Gary Weber, who assertedly suffered personal injuries arising from his arrest on the same occasion, brought this action alleging state and federal claims against the City of Rochester, the County of Monroe (the "County"), several

Rochester police officers, an employee of the Rochester Police Department, and the Monroe County Sheriff (the "Sheriff"). We consider[1] plaintiffs' appeal from the denial of their motion for partial summary judgment on the issue of the liability of the County and the Sheriff under 42 U.S.C. § 1983 for the search of Ann Weber, the dismissal of the complaint as to those defendants, and the grant of summary judgment in their favor. Because we conclude that the search violated Mrs. Weber's rights under the Fourth Amendment, we reverse the district court's decision and direct the entry of partial summary judgment in favor of appellant Ann Weber as to the liability of the County and the Sheriff under Section 1983 for the challenged strip/body cavity search.[2]

BACKGROUND

The following rendition of the facts has been gleaned from the complaint, affidavits submitted below and transcripts of depositions conducted below, and may contain factual matters in dispute between the parties to this

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1 An appropriate order was entered below pursuant to Fed. R. Civ. P. 54(b) directing the entry of an appealable final judgment with respect to the matters considered in this opinion.

2 This court has the power in appropriate circumstances to reverse a district court's grant of summary judgment and to grant summary judgment for the nonmoving party. *See Ithaca College v. NLRB*, 623 F.2d 224, 229 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Abrams v. Occidental Petroleum Corp.*, 450 F.2d 157, 165-66 (2d Cir. 1971), *aff'd sub nom. Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973); 6 Moore's Federal Practice ¶ 56.12. It may do so *a fortiori* where, as here, the adversary parties have moved for summary judgment. *Id.* ¶ 56.13, at 56-348 to 349. In view of the conclusions expressed herein, no purpose would be served by remanding for further litigation as to liability concerning the questions decided in this opinion.

litigation.[3] No such matters preclude our summary disposition of the issues before us, however, since the County and the Sheriff concede that pursuant to jail policy a jail employee undertook a strip/body cavity search of Mrs. Weber after her arrest on misdemeanor charges in the absence of any ground other than her status as an arrested person for concluding that she was likely to be concealing contraband. The remainder of this strange story we include by way of background.

On June 18, 1983, Ann and Gary Weber attended their daughter's wedding and reception, then hosted a party for some of the wedding guests in their home. The night of celebration must have lost some of its savor for the Webers even before any of the defendants appeared on the scene; in quest of cigarettes, in the early morning hours, the Webers' son left the party with a friend and was assaulted by a man wielding a baseball bat outside an all-night variety store. The son and his friend escaped bodily injury by repairing to their car, but they returned to the Webers' home with a battered vehicle, the assailant having smashed it repeatedly with the bat as they drove away. Upon being apprised by her son of the assault, Mrs. Weber called the Rochester Police Department and reported the incident to a dispatcher.

Shortly thereafter, the Webers' son left with several other family members and guests to seek out his assailant. Approximately half an hour after she made the first report, Mrs. Weber called the Police Department a second

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3 The only claims pleaded against the County and the Sheriff are the violation of 42 U.S.C. § 1983 described earlier herein, and a violation of U.S.C. § 1985 resulting from an alleged agreement between the County, the Sheriff and the City of Rochester to effectuate the policy of strip/body cavity searches.

time and asked what she needed to do to procure police assistance. The dispatcher who spoke with Mrs. Weber already knew about the incident, since she had taken the first call as well and had reported the attack as an episode of "malicious mischief." She allegedly told Mrs. Weber that emergency police assistance would arrive only if Mrs. Weber were to report a shooting. Mrs. Weber—in an agitated state, we suppose—complied. The dispatcher then informed the police that Mrs. Weber had reported a shooting, but that it was probably a false and illegal report.

The police then began to arrive at the Webers' home. According to the plaintiffs, the police placed Mrs. Weber under arrest for a false report, whereupon she retreated into her home with the police in hot pursuit. Mr. Weber exchanged words with the officers, still more officers arrived, and all entered the Webers' home over Mr. Weber's protest. Mr. Weber was placed in a police car after suffering injuries, he alleges, at the hands of the officers.

There ensued some movement of officers and Webers throughout the Weber home. The Webers claimed later that the officers had beat them without provocation; the officers claimed that the Webers had resisted arrest. In either event, the officers eventually carried Mrs. Weber out of her house and transported her, still protesting, still dressed in formal wedding attire, now encumbered with handcuffs, to the Monroe County Jail, where they charged her with the misdemeanor offenses of falsely reporting an incident and resisting arrest.

After booking, Mrs. Weber was photographed and fingerprinted, then taken to a vacant cell. There the occurrences that gave rise to the issues before us took

place. Pursuant to a Monroe County Jail policy providing for strip/body cavity searches of all arrestees, Mrs. Weber was required to remove all her clothing and to expose her body cavities for visual inspection. She won her release half an hour later, after her newly wed daughter arrived at the jail and posted bail. Mr. Weber had meanwhile been charged with obstruction of governmental administration and resisting arrest, then taken to a hospital and treated for wounds to his face.

After trial and acquittal of all charges in Rochester City County, the Webers brought this action challenging *inter alia* the strip/body cavity search of Mrs. Weber, on the ground that jail employees had performed that search with no reasonable suspicion that Mrs. Weber was carrying weapons or other contraband, in violation of her rights under the Fourth Amendment.[4] The County and Sheriff moved for summary judgment. The Webers cross-moved for partial summary judgment against the County and the Sheriff on the issue of their liability under 42 U.S.C. § 1983 for the strip/body cavity search of Mrs. Weber. Not reaching the immunity or state law defenses raised by those defendants, the court below granted them summary judgment on the ground that the search of Mrs. Weber's person and body cavities did not violate her constitutional rights.

We reverse.

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4 The defendants ground their defense on the agrument that a reasonable suspicion of the particular arrestee is unnecessary to justify strip/body cavity searches. They do not seriously argue that they harbored any such suspicion of Mrs. Weber—except for one small suggestion raised by defense counsel in her brief and at oral argument. We reject as ridiculous the suggestion that, for lack of a purse or pockets, a woman dressed in a formal evening gown is in fact more likely than a man or a woman dressed in casual attire to be concealing contraband in her body cavities.

DISCUSSION

I. *The Constitutionality of the Search Policy*

According to the Sheriff, the jail employees conducted the search of Mrs. Weber pursuant to a Monroe County Jail policy calling for strip/body cavity searches of all arrested persons other than those placed in "holding cells," which are the cells in which arrestees are sometimes placed when their release on bail is imminent. In deciding that such a policy is constitutional, the district court held that "once a person becomes a prison inmate, he or she loses any Fourth Amendment protection from strip/body cavity searches if prison administrators have reasonable grounds for concluding that the inmate is in a position to be carrying contraband." *Weber v. Dell*, 630 F. Supp. 255, 259 (W.D.N.Y. 1986). It is not clear to us precisely how one analyzes whether a recently arrested inmate is in a *position* to be carrying contraband, as opposed to the likelihood, under the circumstances attending the arrest, that he or she is in fact carrying it; applying the former standard, in any event, the district court found a reasonable ground for subjecting Mrs. Weber to such searches in the Sheriff's "rough estimates" that seventy percent of all arrestees carry contraband. *Id.*

In setting forth its analysis, the court expressly rejected holdings in other circuits requiring some reasonable suspicion, founded on the characteristics of the particular arrestee or arrest or the nature of the crime with which he or she is charged, to justify such searches. Instead, the court based its own analysis directly on its reading of *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Block v. Rutherford*, 468 U.S. 576 (1984). The court decided that *Block* added a "gloss" to *Wolfish*, and that together the cases stand for

the proposition that "a district court should not substitute its view of the proper administration of a jail" for that of the jail officials. *Weber v. Dell*, 630 F. Supp. at 258.[5] We must agree with Mrs. Weber that the district court misread *Wolfish* and read *Block* far too broadly. We accordingly adopt the reasonable suspicion standard that governs in other circuits, which we think *Wolfish* suggests and *Block* leaves undisturbed.

We turn, then, to an examination of those cases. In the portion of *Bell v. Wolfish* that applies directly to the issue before us, the Supreme Court held that probable cause is not necessary to justify routine strip/body cavity searches of arraigned pre-trial detainees after those inmates have had contact with visitors from outside the institution. Instead, the "test of reasonableness" requires a "balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 559. In the *Wolfish* setting, that test required the balancing of "the significant and legitimate security interests of the inmates." *Id.* at 560. In concluding that the security interests of the prison in undertaking strip/body cavity searches after "contact" visits outweighed the privacy interests of the inmates—prisoners who had already been arraigned, had failed to make bail, and had presumably chosen to receive visitors and to enjoy physical contact with them—the Court recognized the need for "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of

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5 The court below also adverted, 630 F. Supp. at 258, to *Whitley v. Albers*, ____ U.S. ____, 106 S. Ct. 1078 (1986), as a recent Supreme Court expression of the deference to be accorded prison administrators with respect to security matters. Indeed it is, but in a context (an alleged infringement of Eighth Amendment rights when a prisoner was shot during a prison riot) too remote to be of much assistance here.

general application." *Id.* at 546 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)). It did not, however, read out of the Constitution the provision of general application that a search be justified as reasonable under the circumstances. The imposition of a standard short of probable cause in determining the balance of interests at stake in *Wolfish* in no way dispensed with that requirement.

Nor did *Block v. Rutherford* free prison officials from all Fourth Amendment constraints. A Fourteenth Amendment case, *Block* held that pre-trial detainees were not entitled as a matter of substantive due process to receive contact visits or to observe prison officials' searches of their cells. *Block* indeed emphasized the administrative and security needs of prisons and the propriety of deference to prison officials' decisions; it balanced those considerations, however, not against the interest in avoiding the intrusions of strip searches and body cavity searches, but against the alleged substantive due process rights to receive visits in prisons unimpeded by glass walls and to watch while officials engaged in concededly permissible searches of prison cells. Surely, any hypothetical "privacy"-type interest at stake in the latter contexts would be of a lower order than the interest in avoiding strip/body cavity searches. Furthermore, the *Block* holding expressly applies to detainees—"by definition persons unable to meet bail," many of whom are "awaiting trial for serious, violent offenses" and "have prior criminal convictions." 468 U.S. at 586.

An examination of cases from other circuits supports our view that *Block* and *Wolfish* do not suggest, much less require, the result reached here. In finding the search of Mrs. Weber constitutional, the district court below

discounted ten opinions from seven circuits that succeeded *Wolfish* and "refused to condone strip/body cavity searches of *all* arrestees entering a jail." 630 F. Supp. at 259 (emphasis in original).[6] All but one of these cases held the particular search at issue unconstitutional. *Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983), the exception, sanctioned the strip/body cavity search of a woman formally charged with a violent felony. Furthermore, four of these cases were decided after *Block*,[7] and thus pre-

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6 *See Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985) (strip/body cavity search of arrestee who refused to sign summons and became belligerent toward arresting officers was unconstitutional); *Stewart v. County of Lubbock*, 767 F.2d 153 (5th Cir. 1985) (reasonable suspicion standard did not justify strip searches of persons arrested for misdemeanors punishable only by fine), *cert. denied*, ____ U.S. ____, 106 S. Ct. 1378 (1986); *Levka v. City of Chicago*, 748 F.2d 421 (7th Cir. 1984) (reviewing damage award for an unconstitutional strip/body cavity search); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984) (arrestees for traffic law violations and other minor offenses may be strip-searched only if reasonable suspicion standard is satisfied), *cert. denied*, ____ U.S. ____, 105 S. Ct. 2114 (1985); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984) (strip search of traffic offender was unconstitutional where no circumstances indicated that the offender might have been concealing contraband and the offense was not associated with such concealment); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983) (policy calling for strip/body cavity searches of women arrested for misdemeanor offenses was unconstitutional); *Tikalsky v. City of Chicago*, 687 F.2d 175 (7th Cir. 1982) (strip/body cavity search of woman arrested for disorderly conduct violated her Fourth Amendment rights); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981) (strip search of DWI arrestee was unconstitutional), *cert. denied*, 455 U.S. 942 (1982); *Tinetti v. Wittke*, 479 F.Supp. 486 (E.D. Wis. 1979) (probable cause was necessary to justify strip searches for non-misdemeanor traffic offenses), *aff'd*, 620 F.2d 160 (7th Cir. 1980) (per curiam); *cf. Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983) (strip/body cavity search of arrestee charged with felonious assault was distinguished from cases in which minor offenders were subjected to such searches). All of these cases except *Levka v. City of Chicago* and *Tinetti v. Wittke* specifically considered and applied *Bell v. Wolfish*.

7 *See Jones v. Edwards*; *Stewart v. County of Lubbock*; *Levka v. City of Chicago*; and *Giles v. Ackerman*; *see also Ward v. County of San Diego*, 783 F.2d 1385 (9th Cir. 1986) (reaffirming that reasonable suspicion is required in Ninth Circuit to justify strip/body cavity search of arrestee).

sumably took into account the gloss that the district court here found *Block* added to *Wolfish*. Thus, if there could be any doubt that the balance of interests struck in *Block* does not dictate the result the court reached in this case, the law in other circuits shows that it does not. Indeed, even before the Supreme Court decided *Block*, five circuits had agreed that pre-trial detainees are not entitled to contact visits, *see Block*, 468 U.S. at 582 n.6; three of those—the Fourth, Seventh and Tenth Circuits—had held that policies permitting routine strip/body cavity searches of arrestees were, in contrast, unconstitutional. See *supra* note 6.

We note that at the end of the opinion below, the court seems to narrow its holding, observing that Monroe County Jail policy appears to subject arrestees to strip/body cavity searches only when the arrestees are unable to make bail immediately and, for reasons such as overcrowding, are moved from the holding cells in which they are initially placed into cells near arraigned inmates. 630 F. Supp. at 261. It is not clear from the record that the jail itself so characterizes its policy or that it followed such a policy in searching Mrs. Weber; she stated in her affidavit that no one asked her if she could make bail and that the jail was not crowded during her stay. The presence of such disputed matters should have precluded the grant of summary judgment in favor of the defendants if the court intended to uphold the policy only as restated and narrowed. Furthermore, the court relied on incompetent affidavits and facts that would be inadmissible as evidence, *see* Fed. R. Civ. P. 56(e) and 32(a), such as the Sheriff's assertion that seventy percent of arrestees carry contraband into the jail, a conclusory estimate based neither on personal observation nor on an analysis of the

jail's records. *See Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980).

We find it unnecessary to remand for findings on those issues, however, because we believe that even the more narrowly drawn policy would be unconstitutional and that the Sheriff's assertion, if substantiated, would still not provide that "particularized suspicion," *see United States v. Montoya De Hernandez*, ____ U.S.____, 105 S. Ct. 3304, 3310 (1985), arising either from the nature of the charge or specific circumstances relating to the arrestee and/or the arrest, which the law requires for so intrusive and demeaning an investigative procedure as a strip/body cavity search. *See also United States v. Ogberaha*, 771 F.2d 655 (2d Cir. 1985); *cf. Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272-73 (7th Cir. 1983) (detailed statistical analysis did not establish justification for blanket strip/body cavity searches of arrested misdemeanants where contraband was found only on women charged with prostitution, narcotics violations, or assault). We hold that the Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest.

II. *The Liability of the County*

In light of its disposition of the Fourth Amendment issue, the district court did not reach the question whether the County could be held liable for a search conducted by Monroe County Jail employees if that search was unrea-

sonable. Defendants argue that the County cannot be held liable, citing the Constitution of the State of New York,[8] *Barr v. County of Albany*, 50 N.Y.2d 247, 406 N.E.2d 481, 428 N.Y.S.2d 665 (1980), and *Wilson v. Sponable*, 81 A.D.2d 1, 439 N.Y.S.2d 549 (1981).

Those authorities do not stand for the proposition that a county cannot be held liable for unlawful acts that the county itself commits when it establishes or implements unlawful policies; rather, they hold that a county is not vicariously liable for the tortious acts of a sheriff. Under that interpretation, *Barr* and *Wilson* are perfectly consistent with *Monell v. Department of Social Services*, 436 U.S. 658 (1978), in which the Supreme Court held that a municipality is a person and can incur section 1983 liability as a consequence of policies it promulgates even though it cannot incur such liability under a *respondeat superior* theory. In any event, immunity from liability under section 1983 is not a question of state law but of federal law. " 'A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.' " *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974)) (citation omitted).

The test for county liability here, then, is whether the decision to subject arrestees to strip/body cavity searches without regard to the specific characteristics of the ar-

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[8] Article XIII, § 13(a) of the New York Constitution provides that "the county shall never be made responsible for the acts of the sheriff."

restees or arrests or the nature of the crimes with which they are charged "may fairly be said to represent official policy." *Monell*, 436 U.S. at 694. We believe that it can. As the Sheriff testified in his deposition, he was the "policy maker for this division . . . as it relates to strip search." By ordering such searches, the Sheriff established county jail policy, and defendants offer no authority for the argument that, as the highest ranking law enforcement official in the County, he was not entitled to do so. *See Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986) (Where municipal official is responsible for establishing governmental policy respecting challenged activity, municipal liability attaches); *Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985) (where sheriff was responsible for promulgating security policies for correction facilities, "there could hardly be a clearer case of county liability" for damage caused by strip search rule).

In this connection, we reject defendants' argument that the Sheriff's policy is mandated by N.Y. Admin. Code tit. 9, § 75021.1(a), which provides that "[b]efore being placed in a cell or detention room, the clothing and person of each prisoner shall be thoroughly searched." The regulation does not on its face compel strip/body cavity searches; indeed, defense counsel conceded at oral argument before the district court that the Sheriff had interpreted the regulation in a manner not necessarily required by its terms. 630 F. Supp. at 257. The district court accordingly held that the "strip search policy *implemented by the Sheriff* is constitutional." *Id.* at 257 (emphasis added). In view of our contrary determination as to the policy's constitutionality, the County is liable for the damage the policy caused.

III. *The Sheriff's Claim to Immunity*

Defendants argue that because the search of Mrs. Weber did not violate "clearly established" constitutional rights at the time of search, the Sheriff is entitled to good-faith immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Salahuddin v. Coughlin*, 781 F.2d 24 (2d Cir. 1986), this court explained the *Harlow* test as follows: "The pertinent test in applying [the objective good-faith] defense is whether the federal law violated was clearly established, . . . not whether a reasonable person would have known of the law." *Id.* at 27 (citations omitted). Although this question is perhaps closer than the others, we think that the law was clearly established and that the Sheriff is not entitled to the good-faith immunity defense. *See Jones v. Edwards*, 770 F.2d 739, 742 n.4 (8th Cir. 1985).[9]

At least eleven circuit court decisions, three of them antedating the search in this case, hold similar policies unconstitutional. See *supra* notes 6 and 7, and cases there cited. In this circuit, although we have not directly ruled on the precise issue presented in this case, we have variously described "the indignities of a rectal search," *Sostre v. Preiser*, 519 F.2d 763, 764 (2d Cir. 1975), as "insensitive, demeaning and stupid," *Sala v. County of Suffolk*, 604 F.2d 207, 211 (2d Cir, 1979), *vacated and remanded*, 446 U.S. 903 (1980), "degrading," and a "major invasion into privacy." *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187, 208 (2d Cir. 1984).[10] It may be true, as appellees argue, that there is

9 We note that even if the Sheriff were entitled to such a defense, it would not extend to the County. *Owen v. City of Independence*, 445 U.S. 622 (1980).

10 We note that *Security and Law Enforcement Employees v. Carey* did not precede the events here litigated.

not "one case which prohibited body cavity searches of people [sic] charged with resisting arrest."[11] But Monroe County Jail policy is not restricted to such persons. In any event, a probable explanation for the absence of such cases is that other government authorities have sensibly abandoned or declined to establish policies calling for routine strip/body cavity searches of all persons resisting arrest. As we have noted, municipalities that have adopted similar policies, uniformly subjecting intoxicated traffic law offenders and other misdemeanants to such searches, have all seen those policies abrogated when challenged. *Securities and Law Enforcement Employees v. Carey*, which granted qualified immunity to correction officers who ordered unconstitutional strip/body cavity searches of their fellows, thus stands in contrast, because those officials "operated in an area in which the law was not charted clearly." *Id.* at 211.

CONCLUSION

We recognize the need, when the intrusion of strip searches and body cavity searches is reasonably justifiable, to defer to the judgment of prison officials charged with preserving order and maintaining the security of detention facilities; such deference is sometimes appropriate even if in the judgment of the court less intrusive means to secure the prison and protect the safety of jailers and inmates might have been employed. Deference, however, is not a dispensation from the requirement under the Fourth Amendment that searches be reason-

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11 *Cf. Jones v. Edwards*, 770 F.2d 739, 741-42 (8th Cir. 1985), and *Alberts v. City of New York*, 549 F. Supp. 227, 229 n.2 (S.D.N.Y. 1982).

able. We conclude that a reasonable suspicion that an accused misdemeanant or other minor offender is concealing weapons or other contraband—suspicion based on the particular traits of the offender, the arrest and/or the crime charged—is necessary before subjecting the arrestee to the indignities of a strip/body cavity search.[12] We also conclude on the facts of this case that the jail employee undertook the search of Mrs. Weber pursuant to County policy, and that the Sheriff who promulgated that policy is not entitled to a good-faith immunity defense. We accordingly reverse the judgment below, and direct the entry of summary judgment in favor of appellant Ann Weber as to the liability of the County and the Sheriff under 42 U.S.C. § 1983 with respect to the challenged strip/body cavity search.

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12 *Compare Smith v. Montgomery County* (D. Md. Sept. 8, 1986) (available Oct. 15, 1987, on WESTLAW, DCT database), holding that reasonable suspicion exists to strip search all felony arrestees, all temporary detainees arrested for misdemeanor offenses that involve weapons or contraband, and all temporary detainees with prior records of convictions or unresolved arrests for felony offenses or for misdemeanors involving weapons or contraband, and asserting that such "bright lines" formulae are necessary to provide workable guidance to jail administrators.

APPENDIX C

BEST AVAI

LABLE COPY

PRISONER DATA REPORT

FOR 66 793 — ARR 6-19-83

WEBER, ANN
Bowlin, Ann
65 749
120-30-0279
20 PENHURST ST ROCHESTER NY 14619 ROCHESTER
20 PENHURST ST 6-19-83 6-19-83 20 PENHURST ST 0515 hrs.

PL	240.50-3A	A MISD	S. SHANNON 413 REMBERT 601	1003
PL	205.30	A MISD	RESISTING ARREST 4801	

PHOTOS

DEFENDANT DID MAKE FALSE REPORT OF "SHOTS FIRED" / PEOPLE SHOT AT LOCATION TO EXPEDITE POLICE RESPONSE; UPON ARREST DEFENDANT FOUGHT WITH OFFICE

No New Data No Pistol Found No WARRANTS

35 Drugs - Perscription

10/21/38 44 — 135

526 Brook Brown HED X — RECEIVER — Pale

NONE — 12th — MARRIED — Gary J. # — Lo

Margaret Dennagher Enfield Lester # 47 # 47

Howard Warehouse 515 Walton Rd DEPUTIES

DEPUTIES

NONE — LED — Deckelbaum

Deputies — DEP — $100.00 — LED 0409 0503

Bail 6-19-83 0600 — Bail $100.00 — Deckelbaum

UNKNOWN

RPD RECORDS

APPENDIX D

9 NEW YORK CODE RULES & REGULATIONS §7502

Section 7502.1 Admission Procedures

(a) Before being placed in a cell or detention room, the clothing and person of each prisoner shall be thoroughly searched.

(d) Searching of a female prisoner shall be accomplished by the regularly appointed police matron, or other qualified female person whose services may be available on a part-time basis.